

# Diminished Rationality, Diminished Responsibility

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## I. INTRODUCTION

This Commentary proposes that the criminal law should include a generic, doctrinal mitigating excuse of partial responsibility that would apply to all crimes, and that would be determined by the trier of fact.<sup>1</sup> This partial excuse would apply in cases in which a defendant's behavior satisfied the elements of the crime charged, but the defendant's rationality was non-culpably compromised and thus the defendant was not fully responsible for the crime charged.<sup>2</sup> Current Anglo-American criminal law contains no such generic partial excuse. Some doctrines, such as provocation/passion and extreme mental or emotional disturbance for which there is reasonable explanation or excuse, appear to operate in effect as partial excuses. They typically apply only in limited contexts, however, such as to reduce a homicide that would otherwise be murder to manslaughter.<sup>3</sup>

Criminal law already recognizes the moral importance of "partial responsibility" for determining just punishment. Despite the lack of a generic mitigating excuse and strict limitations on the few doctrines that serve this purpose, the relevance of diminished rationality and diminished responsibility to sentencing is widely and generally accepted. For example, *Atkins v. Virginia*,<sup>4</sup> which categorically prohibited capital punishment of people with retardation on Eighth Amendment grounds, was based precisely on this recognition. The Court wrote,

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<sup>1</sup> I will use the terms "partial responsibility" and "diminished responsibility" interchangeably, but the former should be preferred because there is no extant legal doctrine by that name with which the proposed doctrine could be confused. Diminished responsibility is probably more accurately descriptive, but there does exist a doctrine with which the proposal might be confused. See English Homicide Act, 1957, 5 & 6 Eliz. II, ch. 11, § 2(1) (Eng.) (criteria for "diminished responsibility").

<sup>2</sup> The defendant could also plead in the alternative any other mitigating or full affirmative defense, such as legal insanity.

<sup>3</sup> MODEL PENAL CODE § 210.3(1)(b) (1962). The English doctrine of "diminished responsibility" is likewise limited to reducing murder to manslaughter. See English Homicide Act, *supra* note 1. See generally GEORGE MOUSOURAKIS, CRIMINAL RESPONSIBILITY AND PARTIAL EXCUSES (1998); PARTIAL EXCUSES TO MURDER (Stanley Meng Heong Yeo ed., 1991).

<sup>4</sup> 536 U.S. 304 (2002).

Mentally retarded persons frequently know the difference between right and wrong. . . . Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and to learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. . . . Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability. . . . With respect to retribution—the interest in seeing that the offender gets his “just deserts”—the severity of the appropriate punishment necessarily depends on the culpability of the offender.<sup>5</sup>

The Federal Sentencing Guidelines also explicitly adopt this principle by providing for a reduced sentence if a “significantly reduced mental capacity . . . contributed to the commission of the offense.”<sup>6</sup> Although this provision applies only to non-violent offenders, the limitation is based on considerations of public safety, rather than on the belief that violent offenders never suffer from reduced mental capacity or that such incapacity does not affect the culpability of violent offenders. Even the current legislative trend in many jurisdictions towards determinate sentencing does not undermine the general acceptance of this view because it is motivated primarily by concerns with disparate sentencing, rather than by the belief the impaired rationality is unrelated to diminished responsibility.

I have previously argued that the criminal law should jettison the provocation/passion doctrine and should not adopt a generic partial responsibility doctrine because neither was morally necessary, the practical costs of adopting a generic partial defense would be unacceptably large, and provocation/passion was applied unfairly.<sup>7</sup> I continue to believe, buttressed by more recent feminist analysis, that traditional provocation/passion doctrine is unwise. Theoretical reflection and practical experience have led me also to believe, however, that a generic partial responsibility excuse is a moral imperative for a just criminal law that attempts never to punish defendants more than they deserve.

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<sup>5</sup> *Id.* at 318–19.

<sup>6</sup> U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (2002).

<sup>7</sup> Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 28–36 (1984). *But see* Joshua Dressler, *Reaffirming the Moral Legitimacy of the Doctrine of Diminished Capacity: A Brief Reply to Professor Morse*, 75 J. CRIM. L. & CRIMINOLOGY 953 (1984). In recent years, feminist scholars have made the same recommendation concerning provocation/passion on related grounds. *See* JEREMY HORDER, PROVOCATION AND RESPONSIBILITY 186–97 (1992); Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331 (1997); Celia Wells, *Provocation: The Case for Abolition*, in RETHINKING ENGLISH HOMICIDE LAW 85 (Andrew Ashworth & Barry Mitchell eds., 2000). *But see* Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 975–84 (2002) (responding to the feminist challenge).

I shall begin to explain the proposal for a generic partial excuse with a moving and motivating case from my own consulting practice. Then, I shall turn to the theoretical, moral, and legal arguments that have finally persuaded me to make the proposal. Next, I address the proposal itself and the potential objections to it. I conclude that such a proposal would make the criminal law more just, would be workable, and would not compromise the integrity of trials or public safety.

## II. AN EXEMPLARY CASE<sup>8</sup>

Bruce North killed John Ellis and was charged with first-degree murder. The state in which this occurred retains both the traditional distinction between first- and second-degree intentional murder based on a premeditation/deliberation formula and the traditional provocation/passion test to reduce an intentional killing to voluntary manslaughter. At the time of the crime, North was in his late twenties. He is an intelligent man with a college degree in business. North had no previous history of mental disorder, mental health treatment, or troubles with the law. He is the only child of a prosperous, educated father and an educated homemaker mother. After college, North worked for a variety of businesses in Metropolis, a large city in the same state as the town, Franklin, in which he grew up. North's business career did not flourish, however, and on occasion there were incidents that might have been interpreted as evidence of paranoid ideation. There was no indication that North ever had a break with reality—a psychotic episode—and he appears to have led an entirely functional life until approximately a year and a half before the homicide.

A few years before the crime, North's father, Dan, decided to set up a new business. While North was visiting with his father in Franklin, an associate in Dan's business, Robert Johnson, visited Dan. Johnson suggested that North should join the proposed business. Dan then asked North to move back to Franklin to assist with setting up the business. North agreed and worked extremely hard for many months. During those months, North developed a strong antipathy towards Johnson, reported to his father that Johnson had tried to poison him on a business trip, and insisted that Johnson was "dishonest, evil, and dangerous." Dan North took this information with a grain of salt.

As the Norths worked to establish the business, they realized that they lacked the expertise to accomplish part of the business plan. They therefore searched for a potential partner with the particular experience needed, and identified John Ellis as a prospect. After several meetings that Ellis and his colleagues viewed as difficult because North asked so many obsessive and distracting questions, the

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<sup>8</sup> Although all the information in this section is derived from public records, I have changed the names and amended many details in order to protect the privacy of the parties involved and to permit the reader to focus on the issue of partial responsibility. The appeal process continues as of the time of this writing.

Norths and Ellis agreed to a further meeting. North, Dan, and Ellis met for about three hours in the living room of the house in which North was living. Bruce North initially took detailed and technical notes of the conversation, as he usually did, but the note taking trailed off and ultimately stopped. Otherwise, Bruce North sat silently throughout most of the meeting.

According to Dan North, the meeting went well and they reached an agreement in principle. At one point, while Ellis was out of the room, Bruce North asked his father to ask Ellis whether Ellis knew Johnson. Dan North asked this question after Ellis returned. Ellis replied that he did not know Johnson. At the end of the meeting, Bruce remarked that there did not seem much work for him in the business at that time, and he asked Ellis if it would be detrimental to the overall plan if he returned to Metropolis. Ellis politely answered that North's temporary return to work in Metropolis would be fine and that North could return to take over the business again when needed. Bruce North then excused himself to go to the bathroom. He took a gun that he kept in the bathroom and returned to the living room, where his father and Ellis were still chatting. Bruce heatedly said to Ellis, "You're lying, you're lying," as he shot Ellis five times in the chest. Dan North then took the gun from Bruce, and called the police. North was arrested shortly thereafter.

About two hours after the shooting, North gave the police a detailed, long, voluntary confession that included both rambling, incoherent statements that indicated fear of the business partners and coherent, appropriate statements concerning the shooting. Quite understandably, North was terribly shaken by what had happened and fearful of being in jail. The jail authorities ordered that North should be observed on a routine schedule to insure that he did not injure himself or otherwise require medical or psychiatric intervention. After eight days with no untoward incidents, the observation was terminated and North was then treated as an ordinary prisoner.

Exactly one month after the shooting, North became manifestly psychotic, a condition noted by other jail inmates and staff. Despite the lack of obvious psychosis during that month in jail, North continuously reported delusions to his family, beginning no later than about forty-eight hours after he was arrested and perhaps earlier. It is not clinically remarkable that North was able to conceal his delusional state during that period from all but a few trusted family members. Finally, however, the delusions overwhelmed his ability to hide them. North was found incompetent to stand trial and was sent to a psychiatric facility for diagnosis and treatment to restore trial competence. North was diagnosed as suffering from schizophrenia. Treatment, primarily with psychotropic medication, restored North's competence, and the prosecution proceeded. North had to remain medicated to remain competent, however. Off the medication, he was at high risk to decompensate into a psychotic state.

In retrospect, it is clear that North's behavioral functioning began to deteriorate several months before the killing. North became isolated, neglected his personal hygiene, and on occasion would behave irrationally, erratically, or even

bizarrely with his family and with potential business partners. North's parents noted his poor condition, but they attributed it to the various stresses of work and family life. Again, in retrospect, North was at least in the prodromal phase of a schizophrenic disorder<sup>9</sup> during the months preceding the shooting and during the afternoon of the homicide.

North pled guilty to second-degree murder and the only issue at trial was legal sanity. North claimed that he was psychotic during the business meeting with Ellis. He also claimed that he believed that Johnson was "channeling" himself through Ellis, who planned to kill both Norths, and that he had therefore acted in self-defense. The prosecution's theory was that North was not psychotic at the time of the shooting. Instead, he was simply under a lot of stress and pressure and had "just lost control." The prosecution did not deny the history of behavioral deterioration or the reality of the psychotic episode in jail, but it alleged that the jail episode was the first psychotic break. The jury found that North was legally sane at the time of the shooting.

Assuming that the only available mitigating defense was provocation/passion and that conviction of first-degree murder required genuine weighing of the consequences of the homicide, a conviction for second-degree murder is appropriate in this case. Although there was sufficient time between leaving and re-entering the living room for North to have premeditated Ellis' killing, North was undoubtedly upset. Thus, if premeditation requires relatively cool reflection, then there is a strong argument that North did not satisfy the premeditation test. Neither, however, did North satisfy the provocation/passion standard. Even if he was in a subjective, psychological state that would qualify as "passion," there simply was no provocation by Ellis that would satisfy even the most forgiving test for objective, legally adequate provocation.<sup>10</sup>

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<sup>9</sup> AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 302 (4th ed. & Text Revision 2000) [hereinafter *DSM-IV-TR*] (describing the signs and symptoms of the prodromal phase of schizophrenia).

<sup>10</sup> Some states provide another partial mental state defense to murder that is usually termed "imperfect self-defense," which applies if a defendant honestly but unreasonably believes that he or she needs to use deadly force in self-defense. This doctrine operates like provocation/passion by reducing what would otherwise be murder to manslaughter and its use is similarly limited to prosecutions for murder. Unlike provocation/passion, it is not a diminished rationality doctrine. Imperfect self defense has a powerful moral basis—defendants who believe they are acting lawfully are less culpable—but many states do not have this doctrine and some mentally impaired but legally sane defendants might not suffer from a delusion that would provide a justification if it were true. See *People v. Casassa*, 404 N.E.2d 1310 (N.Y. 1980) (rejecting an "extreme emotional disturbance" claim in a case in which defendant charged with murder for killing a woman who rejected him suffered from substantial mental problems that affected his rationality, but defendant had no plausible belief that killing was justified). If imperfect self defense was applicable in North's case, he would have been entitled to raise this claim, too.

The sentencing judge had little discretion to consider North's mental abnormality. He sentenced North to a mandatory term and recommended that North should serve his sentence in a state mental hospital. Instead, North was sent to prison.

The question this case powerfully raises is whether North deserves to be stigmatized and punished fully as a murderer. Mental abnormality, whether produced by mental disorder, great stress or fatigue, or other potential variables that can non-culpably and substantially impair rationality, rarely negate *mens rea*. The claim that culpability was reduced because mental abnormality negated *mens rea* will seldom succeed. Even if North was legally sane at the time of the homicide, however, he was undoubtedly suffering from a mental abnormality that substantially impaired his capacity for judgment, reflection, and reasoning. In jurisdictions that have adopted the Model Penal Code's mitigating "extreme mental or emotional disturbance" doctrine and are willing to permit mental abnormality to operate as a "reasonable explanation or excuse," North would have had a strong claim for a lesser conviction and substantially reduced punishment that was more precisely proportional to his culpability. But only a small minority of American states employ this test, and it is not clear that mental abnormality can provide a basis for raising this claim. Moreover, as we have seen, this doctrine only applies to reduce murder to manslaughter. Defendants like North clearly have substantially reduced culpability, no matter what crime they are charged with, but they have almost no doctrinal tool with which to make this claim. They are left to the mercy of the sentencing judge's discretion, which is limited or nil under many current sentencing schemes.

The North case and others like it have persuaded me that the law must adopt a generic partial excuse.

### III. THE THEORETICAL BASIS FOR MITIGATION OF BLAME AND PUNISHMENT

I claim that the best interpretation of our moral and criminal law excusing practices is that there are only two basic excusing conditions: diminished rationality and "hard choice."<sup>11</sup> Infancy and the cognitive tests for legal insanity are examples of the former. A reasonable capacity for rationality is the fundamental criterion for responsibility. Young children and some severely disordered defendants are excused not because they are young or ill, but because youth and disorder, respectively, are inconsistent with or impair the capacity for full rationality. Consider the *M'Naghten* test for legal insanity: An agent who, as a result of mental disorder, lacks the capacity to know what he or she is doing or

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<sup>11</sup> Elsewhere, I argue in depth for this assertion. See Stephen J. Morse, *Crazy Reasons*, 10 J. CONTEMP. LEGAL ISSUES 189, 193–203 (1999) [hereinafter Morse, *Crazy Reasons*]; Stephen J. Morse, *Deprivation and Desert*, in FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE: POVERTY AND THE ADMINISTRATION OF CRIMINAL LAW 114, 121–29 (William Heffernan & John Kleinig eds., 2000) [hereinafter Morse, *Deprivation and Desert*]; Stephen J. Morse, *Excusing and the New Excuse Defenses: A Legal and Conceptual Review*, 23 CRIME & JUSTICE 329, 334–62 (1998).

whether it is wrong is not rational in that context. Sentencing reduction based on mental abnormality is premised upon the same basis. Provocation/passion and extreme mental or emotional disturbance as partially excusing mitigating doctrines are best explained by the theory that these conditions non-culpably reduce the capacity for rationality. Finally, the claims for excuses based on newly discovered, alleged syndromes are best justified as irrationality claims. How much rational capacity must be impaired under what conditions to warrant excuse or mitigation is, of course, a normative, moral, political, and legal question.

Duress is the obvious example of "hard choice." The defendant is placed, through no fault of his own, in a hard, "do-it-or-else" choice situation. The defendant may be entirely rational and cool, but if a person of reasonable firmness would yield, the defendant deserves to be excused. The defense is a concession to human weakness when people are grievously threatened with harm to themselves or their loved ones. If the threatening circumstances temporarily unhinge the defendant's reason, non-culpable irrationality would also furnish a theoretical basis for the excuse, but unless the irrationality satisfied the test for legal insanity, the defendant could not make this claim.

We have a much less adequate conceptual and empirical understanding of lack of control than of lack of rationality. Control or volitional tests for legal insanity therefore present a complicated case. If the defendant is sufficiently irrational to satisfy the requirements of a cognitive test, then there is no need to resort to a control test. Consequently, it appears that a control test is necessary only when the disorder does not impair rationality, but instead appears to deprive the defendant of the inability to control his behavior. Sexual offenders, such as most pedophiles, would seem to fit this description. Pure control cases can be analogized to hard choice cases, but that analogy is not terribly successful.<sup>12</sup> Indeed, in virtually all cases in which a defendant presents a plausible claim for a pure control excuse, careful analysis demonstrates that the claim collapses into an irrationality claim and should be adjudicated on that basis. In sum, fair criminal law does not require a control or volitional test for excuse,<sup>13</sup> but I shall assume, for the sake of argument, that there is a limited need for an excuse based on an impaired capacity for self-control.

The capacity for rationality, the "hardness" of choice, and the capacity for control are all continuum concepts. Nonetheless, with precious few exceptions, present criminal law contains doctrinal all-or-nothing, bright line tests: the defendant was or was not legally insane; the defendant did or did not act under duress. Moreover, the criteria for such tests tend to be quite narrow, allowing few

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<sup>12</sup> See Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587 (1994); Stephen J. Morse, *Uncontrollable Urges and Irrational People*, 88 VA. L. REV. 1025, 1058–59 (2002) [hereinafter Morse, *Uncontrollable Urges and Irrational People*]; Morse, *Crazy Reasons*, *supra* note 11, at 201–03.

<sup>13</sup> See Morse, *Uncontrollable Urges and Irrational People*, *supra* note 12, at 1054–75 (arguing for this claim in detail).

defendants to succeed with an excuse. Lesser rationality or control problems, or less grievous threats, may be considered only as a matter of discretion at sentencing.

Present law is unfair because it does not sufficiently permit mitigating claims. Criminal defendants, like people generally, display an enormously wide range of rational and control capacities. Further, there is a substantial range of hardness of choices in cases in which the defendant is legally responsible. In some cases, there may be quite substantial impairments or very hard choices, but such defendants simply have no doctrinal purchase to argue for mitigation. If criminal punishment should be proportionate to desert, as virtually all criminal law theoreticians believe, blanket exclusion of doctrinal mitigating claims and treatment of mitigation solely as a matter of sentencing discretion are not fair. Only the most serious consequential dangers can justify such exclusion, but I shall argue that valid consequential concerns can be successfully addressed.

To understand the unjustifiable limitations of current doctrine, consider the impaired rationality doctrines that reduce a murder to manslaughter: heat of passion upon legally adequate provocation, and extreme mental or emotional disturbance for which there is reasonable explanation of excuse.<sup>14</sup> Why should these doctrines be limited to homicide? For example, suppose a defendant acting in the heat of passion intentionally burns the provoker's property, rather than killing the provoker. Or suppose that an agent suffering from a non-culpable state of substantially diminished rationality commits arson. Some arsonists and some criminals generally might act with non-culpable, substantially impaired rationality that does not meet the standards for a full legal excuse. Compromised rationality and its effect on culpability are not limited to homicide. Fairness and proportionality require that doctrinal mitigation should be available in all cases in which culpability is substantially reduced.

One justification for the limit to homicide might be that homicide is a crime that is doctrinally divided into degrees, thus allowing for a balancing of culpability and public safety concerns, but many other crimes do not have similar culpability differentiation. Thus, there would be no lesser crime to reflect the mitigation. As a result, an impaired defendant must be held fully responsible. But this answer begs the question. The United States Constitution puts minimal restraints on the ability of legislatures to define crimes and defenses as they wish. If the theoretical reason to reduce murder to manslaughter applies more generally, as it clearly does, there is no necessary doctrinal or constitutional hindrance to adopting a broader mitigating doctrine that would produce reduced blame and punishment directly rather than by reducing the degree of crime. The underlying theory of excuse that supports the impaired rationality doctrines within homicide and the doctrines themselves are perfectly generalizable to all crimes. Juries can reasonably make

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<sup>14</sup> Once again, the English "diminished responsibility" doctrine operates similarly and is similarly limited.



the same judgments about mitigation for other crimes that they routinely make to determine if murder should be reduced to manslaughter.

A generic partial excuse will also reduce some of the problems that first-degree murder statutes and capital punishment raise. In some jurisdictions, the premeditation/deliberation formula that distinguishes intentional first-degree and second-degree murder has little substantive content. No time is too short for deliberation to be found or there is no genuine requirement that the defendant must coolly weigh or consider the consequences of homicide. Consequently, in the absence of legally adequate provocation, intentional killers who form the intent to kill after some minimal thought will be held guilty of first-degree murder, even if their rationality was substantially compromised by mental disorder, great stress, or the like. Such defendants may be culpable killers, but according to traditional theories of blameworthiness, they are simply not as culpable as killers who weigh homicide coolly. Nevertheless, sentencing discretion is the only means to avoid the stiffest penalties our law allows, but as I shall argue presently, this is insufficient to assure that proportionate, equal justice is done.<sup>15</sup>

Many capital defendants who are criminally responsible have mental abnormalities that compromise their rationality and responsibility. Unless the homicide qualifies for provocation/passion or for second-degree murder in those jurisdictions that distinguish degrees of murder with a genuinely substantive premeditation/deliberation formula, the defendant can avoid capital punishment only by using mitigating evidence at sentencing. Many capital sentencing statutes already consider mental abnormality as a specific mitigating factor and the Supreme Court has held that the Constitution requires admission of evidence of any mitigating factor, even if it is not specifically included among the statutory factors.<sup>16</sup> Nonetheless, a jury can reject such evidence, which it may be more likely to do after the defendant has been convicted and/or if they are swayed by victim impact statements and the like. Providing a partial excuse at trial would permit the jury in capital cases to consider mental abnormality before conviction and, consequently, would provide a second opportunity to take mental abnormality into account. Thus, a partial excuse available at trial would be another prophylactic against the worst mistake our criminal justice system can make—putting to death a convict who deserves lesser punishment.<sup>17</sup>

The lack of a broad mitigating excuse also threatens to deform other doctrines of excuse and justification. Many of the claims for the creation of specific new syndrome excuses appear to be motivated by the narrowness of criteria for both the insanity defense and the lawful use of deadly self-defense. Assuming the validity of the new syndrome in question, it makes no moral or legal sense to individuate

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<sup>15</sup> See *infra* text accompanying notes 16, 20–22.

<sup>16</sup> *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978).

<sup>17</sup> I oppose capital punishment, but even proponents want the criminal justice system to operate fairly and may concede the validity of this analysis.

excuses according to the causes of a defendant's behavior. To equate causation *per se* with an excuse is the "fundamental psycholegal error."<sup>18</sup> Syndromes can compromise rationality, but the focus should then be on the genuine excusing condition—lack of capacity for rationality in the context—and not on whether the syndrome played a causal role simpliciter in the criminal conduct. Furthermore, in most cases a defendant with a new syndrome will not be sufficiently detached from reality to warrant a successful insanity defense. The solution, however, is not to widen the insanity defense—a full excuse—unjustifiably. Finally, in most cases in which a homicide committed by a sympathetic syndrome sufferer does *not* arise from a confrontation between the defendant and victim, the solution is not to expand the criteria for self-defense, say, by abolishing the imminence requirement. Some homicide perpetrators should be entitled to a pre-emptive defensive strike in extremely limited cases,<sup>19</sup> but not when the homicide is primarily motivated by a syndrome. In the latter case, the defendant is not properly claiming that the criteria for justification are too narrow. Rather, the defendant may present a sympathetic excusing condition, but at present there is no doctrinal means to make the claim.

The solution to all these problems of potential doctrinal deformation is a generic mitigating excuse. If it were available, defendants who suffered from new syndromes or equivalent states would have a doctrinal means to avoid full blame and punishment for the crime charged. Correspondingly, there would be no need to create a new excuse for each new syndrome or unnecessarily to widen the insanity defense. Finally, in cases in which a pre-emptive strike is not justified—assuming that it sometimes might be—self-defense should not be widened. Instead, a generic partial excuse will respond to the need for proportionate justice.

Although partial responsibility can in principle be fully considered at sentencing, this method suffers from substantial defects. First and most important, sentencing is a matter of discretion. Judges may refuse to give reduced rationality its just mitigating force, and there may be wide disparities among judges sentencing similarly situated defendants. Judges, like all members of a society, have some implicit or explicit "theory" of responsibility and how it should guide punishment. Judges' responsibility theories will also differ substantially. There is no guarantee that any individual judge's theory will be consonant with what the legislature or other more representative groups would agree is fair, and thus, the judge's mitigation decision may not comport with community norms. Moreover, mitigating primarily at sentencing removes this important culpability determination from the highly visible trial stage, at which the community's representative—the jury—makes the decision, and relegates it to the comparatively low visibility

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<sup>18</sup> See Morse, *Deprivation and Desert*, *supra* note 11, at 130 (defining the error and explaining why causation *per se* does not excuse).

<sup>19</sup> This is not the law at present, of course, but I have argued for such an exception to the traditional imminence requirement. See Stephen J. Morse, *Neither Desert Nor Disease*, 5 LEGAL THEORY 265, 303–09 (1999); Stephen J. Morse, *The "New Syndrome Excuse" Syndrome*, 14 CRIM. JUSTICE ETHICS 3, 12 (1995).

sentencing proceeding. Our criminal justice system has a preference for making crucial culpability determinations that affect punishment at trial.<sup>20</sup> Partial responsibility is an explicitly normative judgment that should be made, therefore, by the community's representatives at the guilt phase,<sup>21</sup> and not by judges at sentencing.<sup>22</sup>

In sum, neither current doctrines nor sentencing practices can guarantee generally principled, equal consideration of mitigating factors in most cases.

#### IV. THE PROPOSAL: "GUILTY BUT PARTIALLY RESPONSIBLE"

I propose the adoption of a fourth verdict, "Guilty But Partially Responsible," (GPR), that would be available in appropriate cases in addition to guilty, not guilty, and not guilty by reason of insanity.<sup>23</sup> The criteria for the mitigating excuse

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<sup>20</sup> Cf. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

<sup>21</sup> Jurors, too, may be guided by their implicit theories of culpability in determining guilt, but they are a cross section of the community and idiosyncratic views are likely to be tempered in group discussion.

<sup>22</sup> The objection to reliance on judicial discretion is less strong in jurisdictions that constrain sentencing judges with mandatory or suggestive guidelines, because those guidelines incorporate the legislative expression of community norms of culpability. Nonetheless, there will often be the opportunity for some discretion, and consideration of mitigating factors is still relegated to low visibility sentencing.

Many judges and others of course object to guidelines, especially if they are mandatory, because they believe that guidelines that reflect community norms are insufficiently flexible to permit fair sentencing. This belief is questionable, however. Reducing judicial flexibility is objectionable only under the following conjunctive conditions that would suggest the need for greater flexibility: (1) If guidelines inadvertently omit mitigating factors that the legislature's own more general responsibility theory implies, or if they include factors that are inconsistent with the theory; (2) If the judge can correctly identify both those instances in which the legislature made a "mistake" about these matters and those factors that are improperly omitted or included; and (3) If the judge can apply the correct factors in a principled way. Otherwise, flexibility will serve only the judge's personal preferences, not the society's view of justice expressed by the guidelines. Even if these conditions seem to be met, the sentencing judge will seldom be certain that the legislature made a mistake rather than a conscious decision. Consequently, it seems that the power to correct the mistake should be legislative, not judicial. In jurisdictions with guidelines, flexibility essentially provides judges with the power, in direct proportion to the degree of flexibility permitted, to substitute their responsibility theory for the legislature's.

<sup>23</sup> Herbert Fingarette and Anne Fingarette Hasse proposed a similar verdict that has substantially influenced my conceptualization. HERBERT FINGARETTE & ANNE FINGARETTE HASSE, *MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY* 254–57 (1979).

It is important to distinguish GPR from the verdict of "Guilty But Mentally Ill" (GBMI), which has been adopted by a substantial minority of the states. GBMI reflects a jury finding that the defendant was mentally ill at the time of the crime and that the defendant was nevertheless *fully responsible* for the crime charged. A GBMI defendant receives no necessary reduction in sentence—indeed, in some jurisdictions capital punishment may be imposed—nor does it guarantee treatment for the defendant that otherwise would not have been available. Thus, unlike GPR, it is *not* a mitigating (or excusing) "defense." Indeed, it is not a defense at all. Jurors should not be in the business of being asked to reach diagnostic conclusions totally unrelated to culpability. GBMI is a

would be, first, that the defendant's capacity for rationality was substantially diminished at the time of the crime, and, second, that the defendant's diminished rationality substantially affected his or her criminal conduct. The formula I would use would be this: "*The jury may find the defendant GPR if, at the time of the crime, the defendant suffered from substantially diminished rationality for which the defendant was not responsible and which substantially affected the defendant's criminal conduct.*" This formula addresses the underlying, normative excusing condition, uses common sense terms, and is not tied to any limiting model of why a defendant suffered from the requisite disturbance. I have no stake in this precise language, however, and any formula that expressed the two criteria clearly would suffice. As studies of the insanity defense have shown, the words of the test are not crucial.<sup>24</sup> Juries simply need some rough formulation to guide their normative judgment.

Let us consider the criteria. The proposal requires a substantial diminution in rationality because less serious impairments are insufficient to warrant lesser blame and punishment. Any diminution in rationality can of course affect culpability, but as long as the defendant retains substantial capacity for rationality, it is not unfair to require the defendant to exercise this capacity. In brief, there must be serious difficulty in thinking "straight" about one's behavior.<sup>25</sup>

The first criterion of the proposal also requires that the rationality diminution must be non-culpable, which means that the defendant's impaired rationality must be justifiable or excusable. This reflects a socially based evaluative judgment that some rationality diminutions, and the defendant's response to them, are not the defendant's fault.<sup>26</sup> Thus, the proposal does not take an objectionably mechanistic approach to the effect of untoward mental states on criminal behavior.<sup>27</sup> Mental

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useless, confusing alternative that impermissibly allows juries to avoid finding a defendant not guilty by reason of insanity in cases in which legal insanity appears justified. GBMI is like "Guilty but Hepatitis."

<sup>24</sup> See RITA J. SIMON & DAVID E. AARONSON, *THE INSANITY DEFENSE: A CRITICAL ASSESSMENT OF LAW AND POLICY IN THE POST HINCKLEY ERA* 126-35 (1988); HENRY J. STEADMAN ET AL., *BEFORE AND AFTER HINCKLEY: EVALUATING INSANITY DEFENSE REFORM* 8 (1993).

<sup>25</sup> In *Kansas v. Crane*, 534 U.S. 407, 413 (2002), the Supreme Court held that a predicate for the civil commitment of mentally abnormal sexual predators was "proof of serious difficulty in controlling behavior." In *Uncontrollable Urges and Irrational People*, *supra* note 12, at 1054-64, 1074-75, I criticized this criterion as unduly vague. This criticism is not inconsistent with my "serious difficulty" to think "straight" proposal. The distinction is that we understand and can assess rationality defects much more successfully than control defects. Moreover, most "control problems" are better conceptualized as rationality problems.

<sup>26</sup> Those who believe that the present provocation/passion reduction to voluntary manslaughter is justified might well believe that the defendant's passion is not culpable if there is legally adequate provocation. I disagree, especially in cases of the discovery of marital or partner infidelity. See *supra* note 7 and accompanying text.

<sup>27</sup> Cf. Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 321-23 (1996) (arguing that the concept of emotion embedded in the "extreme mental or emotional disturbance" doctrine has been interpreted mechanistically).

disorder and grief are examples of conditions that are non-culpable; voluntary ingestion of mind-altering substances, including ethanol (alcohol), is culpable and would not furnish the basis for mitigation. In some cases, the defendant may not be responsible for causing the impaired rationality, but may be responsible for remaining in that state or for failing to take adequate measures to respond to it. For example, a person with a mental disorder who stopped taking medication for no justifiable or excusable reason and who then relapsed into a disordered state would be considered culpably impaired. Some conditions might be controversial. For example, I believe that great stress may sometimes non-culpably impair rationality, but others may disagree. It seems clear that great stress might serve as a reasonable explanation or excuse that would satisfy the Model Penal Code test of extreme mental or emotional disturbance, thus suggesting its legitimacy as a non-culpable factor. In general, I would trust legislative judgment or the common law process to identify which rationality-diminishing factors would be justified.

The second criterion means simply that the defendant's substantially impaired rationality substantially and specifically affected his practical reason concerning the crime charged. The relation required should not be confused with reductive, "mechanical" causation or causation simpliciter. I am not trying to smuggle back into the law the infamous "product" test for legal insanity that was adopted and then abandoned by the United States Court of Appeals for the District of Columbia.<sup>28</sup> Human action is in issue. Diminished rationality does not simply function as a "but for" cause of the criminal conduct. It must also have substantially impaired the defendant's ability to access and to consider reflectively the good reasons not to commit the crime on this occasion. This criterion is required to address the defendant whose substantial rationality impairment plays only a limited role in affecting his or her specific criminal behavior or who may be suffering from non-culpable diminished rationality that plays no role in the criminal conduct, but that simply co-occurs. For example, a defendant with paranoid beliefs about certain types of people would not be entitled to the mitigation if he were charged with bank robbery or fraud. If the defendant attacked a victim from the group he thought was planning to "get him," however, he might be entitled to the mitigation. Perhaps, however, the human mind cannot be compartmentalized as I imply because it is impossible to say that irrationality in one behavioral domain does not subtly affect rationality in another. One cannot conclusively refute this suggestion, but it is a clinical commonplace that some symptoms of mental disorder appear to operate in limited behavioral domains and do not affect functioning more generally.<sup>29</sup>

The capacity for rationality and responsibility based on that capacity are continuum concepts. Why, therefore, do I propose only a single, one-size-fits-all,

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<sup>28</sup> *Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954) (declaring that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect), *overruled by* *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).

<sup>29</sup> *E.g.*, "Delusional Disorder." DSM-IV-TR, *supra* note 9, at 323-24.

mitigation? Perhaps the law should adopt a generic mitigation that would consider degrees of rationality and responsibility diminution.<sup>30</sup> This would be the correct answer morally, but this is a situation in which morality and law must mesh imperfectly for largely practical reasons. Although an agent's degree of responsibility depends on facts about either the agent's rationality or the hard choices the agent faced, we only have the limited ability to make the fine-grained responsibility judgments that are possible in theory. As the mitigating doctrines of homicide imply, however, some legally responsible defendants suffer from substantially impaired rationality that warrants mitigation and the trier of fact can fairly make this relatively gross culpability judgment about mitigation. There is no reason to believe that in cases of defendants charged with crimes other than homicide, obtaining evidence of impairment or making mitigation judgments would be more difficult than in the case of defendants charged with homicide.

GPR is a partial affirmative defense. Therefore, the Constitution would permit a state to place the burden of persuasion on either the prosecution or the defense.<sup>31</sup> GPR is necessary to insure proportionate blame and punishment. Placing the burden of persuasion on the state would limit the number of cases in which arguably diminished defendants were found fully responsible. On the other hand, a GPR claim might be easy to raise and difficult to defeat beyond a reasonable doubt, even in questionable cases. These considerations suggest that the burden should be placed on the defendant. If the burden were set at the lowest level, preponderance of the evidence, the defendant would be able to convince the jury without undue difficulty that GPR was justified in a wide range of cases and fewer fully culpable and potentially dangerous defendants would successfully claim GPR. There are good arguments on both sides, and I believe that the criminal law could fairly place the burden of persuasion on either party. As a matter of practical politics, however, placing the burden of persuasion on the defendant would make creation of this mitigation more palatable to legislators and to the public.

Guilt determination in most criminal cases is accomplished by a plea agreement. If GPR were available, it would provide the defense with a bargaining chip in plausible cases.<sup>32</sup> This might give prosecutors the incentive to overcharge,

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<sup>30</sup> Cf. Martin Wasik, *Partial Excuses in Criminal Law*, 45 MOD. L. REV. 516, 524-26 (1982) (discussing the "scale" of excuse).

<sup>31</sup> See *Patterson v. New York*, 432 U.S. 197 (1977) (upholding the constitutionality of treating extreme mental or emotional disturbance as an affirmative defense and allocating the burden of persuasion to the defendant).

<sup>32</sup> Under conditions of bargaining about a dichotomous variable, such as the presence or absence of GPR, the dichotomous variable in effect becomes continuous. For example, if the facts of a case seemed to generate a 50% chance of convincing the factfinder that GPR was warranted, the case might be bargained to a plea of guilty, but with a reduction in sentence amounting to 50% of what would have been the GPR reduction. The facts and probabilities are seldom so clear, of course, and thus there will be uncertainty about the settlement point. Moreover, the example assumes either that there was some charge to which the defendant could plead guilty that would produce the

but if substantial prosecutorial overcharging is already endemic, the availability of GPR will not make matters much worse. Conversely, if prosecutors largely act fairly because doing so is right, the availability of this verdict will not turn prosecutors as a class into legal bullies. And, to the extent that GPR *ought* to be available as a matter of justice, the defense should properly have this chip.

Sentencing partially responsible defendants is a critical issue. Although such defendants may be less culpable, in many cases the defendant's impaired rationality may present a continuing, substantial danger. Unless a purely retributivist theory governs punishment—in which case, punishment must be strictly proportional only to desert—a sensible, legislatively-mandated sentencing scheme must try to balance culpability and public safety interests.

The legislature should set a fixed sentence reduction for GPR. This could be a proportion of a fixed term or a proportion of the upper and lower limits of a range. Professor John Monahan refers to this as a "punishment discount."<sup>33</sup> However the reduction is characterized, applying it would be no different in principle from the penalty reduction from murder to manslaughter that follows from a jury verdict or from the reduction for mitigation that a sentencing judge might impose. Moreover, holding plea-bargaining constant, if the reduction were legislatively mandated, its application would be more consistent than if it were left to pure judicial discretion. All defendants convicted of the same crime would receive precisely the same reduction if they successfully raised GPR.

I propose that the amount of punishment reduction should be inversely related to the seriousness of the crime: the fixed reduction would be smaller for more serious crimes and vice versa. Defendants who commit more serious crimes and are therefore more dangerous would be incarcerated proportionately longer than defendants convicted of less serious crimes. In all cases, however, the reduction would have to be substantial to reflect substantially reduced culpability. Consider by analogy the typical penalty difference between second-degree murder and manslaughter, which often provides for a fifty percent reduction. The law already provides for substantial mitigation reduction for the most serious crimes.

Even if all reductions are substantial, one might claim that the inverse relation between seriousness and punishment reductions is unfair because equal impairments should mandate equal proportionate reductions in sentences across all crimes. GPR defendants are criminally responsible, however, and the culpability for more serious crimes is correspondingly greater because the good reason not to offend is much greater. Assuming, in general, equal degrees of impairment across defendants, criminals engaged in serious crimes have more reasons weighing

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bargained reduction or that the judge had the authority to impose the bargained reduction even if the defendant pled guilty to a higher charge.

I thank Seth Kreimer for his help concerning bargaining.

<sup>33</sup> E-mail from John Monahan to Stephen J. Morse (Feb. 19, 2003) (on file with author). Martin Wasik also referred to the punishment reduction for specific mitigating defenses as a discount. See Wasik, *supra* note 30, at 529.

against offending and are therefore more culpable for failing to heed those reasons. An agent has a greater duty to overcome the agent's impairments when greater harm is at stake. Thus, I think that the inverse relation is not unfair and would give weight to public safety.

This proposal would lump together for the same degree of reduction defendants convicted of the same crime but who have disparately impaired rationality and consequently different responsibility. This may seem to be a denial of equal justice, but it results inevitably from the epistemological difficulties confronting more fine-grained assessments that are discussed above. To permit many degrees of punishment reduction would produce confusion and arbitrary decisions, rather than more equal justice. If GPR were adopted, defendants generally would have the potential to obtain just mitigation not currently available. The failure to provide perfect justice in this imperfect world is not a decisive, or even weighty, objection in this instance.

Would GPR reduce stigma as well as reducing punishment? The GPR proposal would find a defendant guilty of the crime charged, but simply less responsible. It is therefore possible that stigma reduction would not ensue. Assuming that the responsibility reduction is provided by a formal verdict expressing a community judgment, however, there seems little reason to believe that conviction for a lower degree of crime has more of an effect on stigma than conviction for the highest offense coupled with a formal responsibility reduction. What is more, even if there is no stigma reduction, there will still be a substantial punishment reduction. As every sophisticated agent in the criminal justice system knows, the most important outcome of conviction to the defendant is whether he or she will go to prison, and if so, for how long.

Once again, I am not wedded to this precise reduction proposal. Legislatures might well adopt different but equally reasonable reduction schemes. It is crucial, however, that the reduction should be legislatively fixed and not left to judicial discretion. Under current law, judges need not reduce sentences for diminished responsibility. It is entirely discretionary. Adoption of GPR would at least have the virtue of forcing sentencing judges to reduce sentences when the jury, the representative of the community, has decided that mitigation is appropriate. Nonetheless, leaving the amount of reduction entirely to judicial discretion would produce private and usually unprincipled sentences.

## V. OBJECTIONS

There are reasonable objections to the proposal. The most important are that it would compromise the efficiency and integrity of criminal trials and would threaten public safety. These objections have force, but they are not dispositive because remedies are available.

Adoption of GPR might inundate courts with trumped up claims and weak or misleading evidence that would create waste and confusion. Indeed, I once found these possibilities decisive objections to partial responsibility, but I now consider



adopting a mitigating doctrine to be worth the risk. Defendants will certainly seek to take advantage of an innovative partial defense, but if justice demands its creation, the criminal justice system ought to bear the reasonable costs of adjudication and society should bear the costs of some increase in threat.

The proposal would widen the latitude for the potentially bogus claims and the questionable evidence that are already a feature of mental state excuses, but I believe that the costs can be contained. The requirement that the impairment must be substantial will curb excesses. Also, to avoid excess, some would argue that the partial excuse should be limited to impairments caused by mental disorder because mental disorder is allegedly objectively verifiable. To open the excuse further would allegedly create the opportunity for evidentiary mischief. Mental disorder, however, is not the only cause of non-culpable rationality impairments. Stress, grief, fatigue, and low intelligence not amounting to retardation, for example, may also non-culpably cause impairments. They are as objectively verifiable as mental disorder and can often be verified without expert testimony. Properly understood, GPR is not premised upon "pathology" in a narrow sense; it is based on any non-culpable diminution of rationality, whether produced by disorders or other causes. It would seem unfair to bar potentially meritorious claims in cases that do not involve diagnosable disorder. Unless experience indicates to the contrary, there is no need for a blanket exclusion *ex ante* of all causes other than mental disorder.

Courts have been able to discriminate colorable mental abnormality claims and reasonable evidence. For example, the dominant interpretation of the federal Insanity Defense Reform Act of 1984 is that defendants are permitted to enter evidence of mental abnormality to cast doubt on whether the defendant had the *mens rea* required by the definition of the crime charged.<sup>34</sup> With rare exception, however, mental abnormality does not negate *mens rea*. Thus, one might fear that federal criminal trials would be flooded with confusing evidence that would seldom raise a plausible claim for *mens rea* negation. Yet, there is little evidence that courts are inundated or that judges and juries are unable to discriminate worthy from unworthy claims and evidence. Jury confusion can be avoided in questionable cases by preliminary hearings on motions *in limine*. Over time, jurisdictions will decide appeals concerning evidentiary rulings that will give trial judges further guidance. Unless actual experience demonstrated that the defense was a procedural disaster, fantasies about the worst possible outcomes should not bar adopting an excuse that has strong moral underpinnings. If, contrary to my expectations, the worst fears come to pass and the costs of adjudicating partial responsibility created more injustice than justice, legislatures are more than capable of abandoning the doctrine.<sup>35</sup>

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<sup>34</sup> See, e.g., *United States v. Pohlot*, 827 F.2d 889 (3d Cir. 1987).

<sup>35</sup> Some states that adopted the Model Penal Code's "extreme mental or emotional disturbance" doctrine have since repealed it. This experience with a test similar to my proposal suggests that there may be problems, but it also suggests that the legislature can respond if it thinks that the problems are too great. I hypothesize that Model Penal Code doctrine has not been successful in some jurisdictions because trial courts have not sufficiently cabined it.

The second major objection is that releasing defendants earlier than the term provided by pure conviction for the crime charged would threaten public safety. At least three mechanisms would fuel the threat. The most obvious is decreased specific prevention resulting from reduced incapacitation, especially if the reduction for serious crimes is substantial. The present, very large punishment reduction for successful provocation/passion claims suggests, however, that society is already willing to bear some public danger costs in order to produce more proportionately just punishment. Indeed, provocation/passion killers may be as or more dangerous than many people guilty of murder. Moreover, by the standards of our peer nations, prison terms in the United States are notoriously long. Even substantial reductions for serious crimes would still expose defendants to lengthy terms of years that would provide sufficient incapacitation to protect the public. The increased threat would also be minimized if the requirement of substantial impairment were met, because relatively few defendants would qualify. Finally, the types of non-culpable rationality impairments, whether permanent or transient, that would support GPR present a more vastly sympathetic case for a partial affirmative defense than acting purely in anger.

Reduced general deterrence is the second mechanism that might threaten public safety. If potential criminals believe that there is a significant probability of a punishment reduction even if they are convicted, the *ex ante* cost of criminal behavior decreases and they will be more emboldened to offend. Assuming, as I do, that criminal punishments do act as deterrents, this is a genuine concern. On the other hand, if virtually all serious criminals will still serve lengthy terms, it is unclear how much marginal deterrence is produced by the difference between the GPR term, which will be substantial for serious crimes, and the full sentence for the crime charged. And once again, if relatively few defendants would qualify, the decrease in marginal deterrence would be minimized. Potential criminals would be aware both that GPR will not generally be a highly valuable bargaining chip in the plea bargaining process and that they would not likely succeed if they went to trial.

The third mechanism that might increase public danger is more speculative. It is possible that providing a generic partial excuse would undermine the belief that agents ought to “take full responsibility” for their actions. The public might then lose respect for the criminal law. If the criminal law is in part a “teacher” and an expression of shared moral community sentiment, offering even a “partial” excuse would thus compromise the criminal law’s educative or moralizing effect, which would diminish general prevention. Defendants who successfully raise GPR will be held criminally responsible, however, and consequently will be required to take responsibility for their conduct. To provide blame and punishment reduction based on fair responsibility ascription will not deny responsibility. Any general prevention decrease resulting from this mechanism is likely to be tiny, and it is in any case too speculative to trump the fair proportionality that GPR tries to achieve.

Like the trial integrity objection, the social safety concern is genuine and important. I do not mean to minimize the dangers of either. It stretches the imagination—mine, at least—to believe that adoption of GPR would be the cause

of a substantial, dangerous increase in crime. Assuming that empirical investigation could attribute a rise in crime specifically to GPR, small increases should be acceptable if the moral claim for GPR is valid. Our criminal law already accepts the possible increase in homicide that the murder/voluntary manslaughter distinction may produce. GPR would apply more widely, of course. For the serious crimes that create the most anxiety, however, there will still be lengthy prison terms available that should satisfy both incapacitative and general deterrent needs. Once again, if GPR did cause an unacceptable increase in crime, legislatures would be more than willing to abolish the partial excuse.

## VI. AN EXEMPLARY CASE REDUX

Let us return to the case of Bruce North to determine how the case might have proceeded if GPR were available.

North's mental condition was deteriorating in the months before the homicide. He was becoming isolated, unkempt, and often behaved erratically, irrationally and, on occasion, bizarrely. North was clearly in the prodromal phase of schizophrenia. During or very shortly after the day of the crime, North suffered from an undoubted psychotic break with reality. North's history and the circumstances of the crime are also inconsistent with the belief that his general rationality was unimpaired and he acted solely from simple stress and pressure that caused him just to lose control. Prior to the period during which his mental and behavioral condition deteriorated, North had no history whatsoever of antisocial behavior or maladaptive anger management. There was no "bad blood" between North and John Ellis. It is plausible that North was disappointed and frustrated when he learned that there was no present role for him in the proposed business, but there is simply no indication that North responded to previous, major frustrations and disappointments with homicidal fury. Finally, the words North spoke as he shot Ellis, "you're lying, you're lying," are not the most rational response to Ellis' reasonable suggestion that North should return to Metropolis to work until the business increased. In sum, North had a powerful GPR claim: the substantial evidence might well have convinced a trier of fact, by a preponderance of the evidence, that he was suffering from a non-culpable rationality impairment caused by mental disorder and that the impairment affected his practical reasoning concerning the crime. No legally adequate provocation occurred, however, and, without GPR, it was inevitable that North would be guilty of at least second-degree murder or even first-degree murder unless he was found not guilty by reason of insanity or unless imperfect self-defense was available.

Assuming that North was legally sane, a conviction for murder, especially first-degree murder, was disproportionately harsh and unnecessary to protect the public. He was certainly no more culpable and no more dangerous than the usual homicide defendant who successfully raises a provocation/passion claim. Unlike the provocation/passion defendant, North's rationality impairment was *entirely* non-culpable. He precisely fits the "extreme mental or emotional disturbance"

criterion for reduction to manslaughter if this claim can be based on mental abnormality, as it should be. Without GPR, however, the only alternatives were murder, legal insanity or imperfect self-defense. First-degree murder should have been unthinkable in a fair criminal justice system. Murder generally was not the morally just outcome. Blaming and punishing North more than defendants guilty of voluntary manslaughter is rationally indefensible. Legal insanity or imperfect self-defense may or may not have been a just outcome depending on the factfinder's conclusion about North's mental state. But the trier of fact should have had another option. GPR was the perfect solution to the search for justice in this case. It would have permitted the jury to find that mental abnormality substantially compromised North's responsibility, which was undoubtedly the case, whether or not North was legally sane or honestly believed he was acting in self-defense.

## VII. CONCLUSION

According to the criminal law's standard theories of blameworthiness, substantial, non-culpable impairments of rationality reduce culpability. But current doctrine provides no general means to raise such claims. Instead, defendants are limited to reducing murder to manslaughter and must otherwise hope for the application of judicial discretion at sentencing. The current law is unfair because it blames and punishes some defendants far more than they deserve. It is also unwise because it facilitates further undesirable results, such as deforming other doctrines or unprincipled sentencing. Adoption of the verdict of Guilty But Partially Responsible would produce more proportionate justice and would not compromise public safety or the integrity of the criminal trial process. GPR is worth a try.